

Gottlieb v Consicecream Corp

2024 NY Slip Op 32627(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 154121/2020

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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DAVID GOTTLIEB, MOSHE E. GELLIS, BATSHEVA
GOTTLIEB GELLIS

Plaintiff,

- v -

CONSICECREAM CORP, YOEL FRIEDMAN,

Defendant.

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INDEX NO. 154121/2020

MOTION DATE 05/09/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is ordered that the motion by Arvind Puroihit, Esq., for an Order, pursuant to CPLR 3025 (b), "granting leave to file and serve an amended summons and complaint to substitute the St. Paul Protective Insurance Company (St Paul) as a party plaintiff to this action, and for such other and further relief as to this Court may deem just and proper," is denied for the reasons that follow.

In this action, plaintiffs David Gottlieb, as Administrator of the Estate of Shmuel Gellis, the deceased infant, Moshe E. Gellis, and Batsheva Gottlieb-Gellis seek recovery for the wrongful death of infant Shmuel Gellis that resulted from an August 9, 2018 motor vehicle accident involving the deceased infant and a vehicle owned by defendant Conesicecream Corp. and operated by defendant Yoel Friedman.

The action was commenced with the filing of a Summons and Complaint on June 9, 2020.

On March 25, 2021 plaintiffs signed a release of claims for uninsured motorist benefits against St. Paul, insurer to Moshe E. Gellis and Batsheva Gottlieb-Gellis, in exchange for \$252,000.00 (see NYSCEF DOC NO 34).

On April 20, 2021, a Consent to Change Attorney form substituting outgoing counsel Adam M. Drexler, Esq., of The Rothenberg Law Firm LLP, with incoming counsel Jesse J.

Prisco, Esq., of the Law Office of Victor J. Natale was filed through NYSCEF along with affidavits of service upon defendants Conesicecream Corp, dated June 22, 2020, and Yoel Friedman, dated September 14, 2020.

On May 24, 2021, The Law Office of Victor Natale filed, through NYSCEF, dated April 19, 2021, an Ex Parte Order, dated April 16, 2021, issued at the Special Term, Supreme Court, County of Suffolk, Index Number 606734/2021 in Matter of the Petition of Travelers Indemnity Company (Travelers) substituting the Law Office of Eric D. Feldman as attorney of record for the Law Office of Victor J. Natale in all matters where Travelers was represented by the Law Office of Victor J. Natale.

On June 2, 2021, the Law Office of Eric D. Feldman filed a motion for an order, pursuant to CPLR §3215 directing the clerk to enter a default judgment in favor of plaintiffs, David Gottlieb, as Administrator of the Estate of Shmuel Gellis, deceased, Moshe E. Gellis and Batsheva Gottlieb Gellis, and against the Defendants Conesicecream Corp. and Yoel Friedman, on the issue of liability, and thereafter for the immediate scheduling of an inquest on the issue of damages, and pursuant to CPLR §3025 (b) granting leave to file and serve an amended summons and complaint to substitute the St. Paul Protective Insurance Company (St. Paul) as a party plaintiff to this action, and for such other and further relief as to this Court may deem just and proper.

In support of the motion for default judgment, movant submitted a May 28, 2021 affidavit of merit from a claims representative from Travelers Indemnity Company and its affiliate or subsidiary St. Paul in which she averred that upon her review of the file and the certified police report and upon information and belief, that the subject claim involves an August 9, 2018 motor vehicle accident involving the vehicle owned by defendant Conesicecream Corp. and operated by defendant Friedman and that Shmuel Gellis was killed as a result of the accident. The affidavit states that plaintiffs Moshe E. Gellis and Batsheva Gottlieb-Gellis were beneficiaries of an automobile insurance policy issued by St Paul with applicable personal injury protection and uninsured motorist coverage and that Shmuel Gellis, their deceased infant son was a covered person under the policy. The affidavit also stated that at the time of the accident defendants were covered by a Metropolitan Property and Casualty Insurance Company Policy and that said insurer disclaimed coverage for defendants' vehicle, making the plaintiffs subrogors (Moshe E. Gellis and Batsheva Gottlieb-Gellis) eligible for payment upon their

uninsured motorist coverage and that St. Paul paid \$252,000.00 insurance benefits to their insured Moshe E. Gellis and Batsheva Gottlieb-Gellis. Attached to the May 28, 2021 affidavit is a Release of Claims for Uninsured Motorists Benefits, dated March 25, 2021, signed by plaintiffs David Gottlieb as Administrator for the deceased minor Shmuel Gellis, Moshe E. Gellis, and Batsheva Gottlieb-Gellis, releasing St. Paul from uninsured motorist claims relating to the August 9, 2018 accident and stating that St. Paul shall be subrogated to the right of recovery of the plaintiff to the extent of the payment made, plus counsel fees and costs and that the undersigned shall fully cooperate with the Company and shall execute and deliver instruments and papers and do whatever else is necessary to secure St. Paul's subrogated right of recovery against any person or organization.

The attorney affirmation in support of the motion for default judgment in 2021 included a supporting attorney affirmation indicating that plaintiff Gottlieb has opted not to continue the prosecution of the wrongful death case and has requested to be removed from the caption of this matter for personal reasons and that as such only the subrogation action remains.

By Decision and Order dated December 6, 2021, the Court in determining the motion for default judgment held that the general claims alleged in the affirmation in support of the motion were insufficient to establish defendants' liability as to the alleged injuries; granted without opposition "plaintiffs' motion for default judgment against defendants Conesicecream Corp. and Yoel Friedman;" and ordered that "defendants' liability and plaintiffs' damages attributable to the defaulting defendant is to be decided at an Inquest;" and that "any relief not expressly addressed herein has nonetheless been considered."

The December 6, 2021 Decision and Order did not address the portion of the motion seeking an order granting leave to serve an amended summons and complaint naming St. Paul as subrogee of Moishe E. Gellis and Batsheva Gottlieb-Gellis as a party plaintiff in this action and asserting a subrogation claim against defendants in the amount of \$252,000.00.

On December 13, 2021, movant filed notice of entry of the December 6, 2021 Decision and Order. On January 19, 2022, movant filed a Note of Issue on behalf of plaintiffs Gottlieb and Gellis along with a supporting attorney affirmation by Arvind Purohit, Esq., as attorney for the plaintiff. The Note of Issue identified St. Paul as insurance carrier and indicated that the insurance carrier is unknown for defendants. An attorney affirmation attached to the Note of Issue did not indicate that the December 6, 2021 Decision and Order granting default judgment

failed to address the portion of the motion for default judgment which sought leave to file and serve an amended summons and complaint to substitute St. Paul as a party plaintiff. On May 24, 2023, this Court dismissed the action because neither side appeared for the inquest scheduled on that date. On March 8, 2024, the Court vacated the May 2023 dismissal order and restored the matter for an inquest scheduled for April 10, 2024. The April 10, 2024 Inquest was adjourned at counsel's request to June 13, 2024. On April 10, 2024, defendants appeared in court and were notified of the June 13, 2024 inquest date. On May 7, 2024, the instant motion was filed and subsequently, the June 13, 2024 Inquest date was adjourned to August 1, 2024.

In the instant motion, St. Paul seeks leave to file an amended summons and complaint naming St. Paul as a direct party plaintiff in this litigation and substituting St. Paul as subrogee of Moshe E. Gellis and Batsheva Gottlieb-Gellis.

In the attorney affirmation in support, movant, St. Paul, the non-party insurer of Moshie Gellis and Batsheva Gottlieb-Gellis, asserts that it has taken over (and/or intervened in) the prosecution of this matter to recover through subrogation approximately \$252,000.00 in uninsured motorist benefits paid out on behalf of the decedent, citing *Peterson v New York State Elec, and Gas Corp.*, 115 AD3d 1029 (3d Dept 2014). Movant's reliance on *Peterson* is misplaced. In *Peterson*, the Appellate Division, Third Department, in affirming a trial court's decision and order that denied the insurer's motion to sever its property damage subrogation claim from the homeowner's personal injury action against the defendant, held that the insurer could not use the personal injury action as a vehicle for seeking subrogation against the defendant. St. Paul has not filed a motion to intervene pursuant to CPLR 1012 or 1013.

"Equitable subrogation is based upon the premise that a person who pays a debt that is owed by another should be allowed the opportunity to be reimbursed in full by the one primarily responsible for the losses" (*Rink v State*, 27 Misc3d 1159, 1162 [Ct of Claims, NY County 2010], *affd* 87 AD3d 1372, [4th Dept 2011]). "The right to equitable subrogation arises when the insurer makes payment on behalf of the insured" (*id.*, citing *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 521-523 [1996]; *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577 [1995], and is well established (*see Fasso v Doerr*, 12 NY3d 80, 88, [2009]). "Subrogation allows an insurance company to stand in the shoes of its insured and seek reimbursement from the one who caused the loss, as long as the insured's rights are not comprised" (*Rink*, 27 Misc3d at 1162.). "No express assignment of the insured's cause of action is required; equitable

subrogation is accomplished by operation of law" (*Patent Scaffolding Co. v William Simpson Constr. Co.*, 256 Cal App 2d 506, 510, 64 Cal. Rptr. 187 [1967]).


"To enforce its right of equitable subrogation, the insurer can bring an independent action against the wrongdoer in the name of its insured, the subrogor, or seek to intervene in an existing action between the insured and the wrongdoer," (*id.*, at 1163). As noted by the Fourth Department, "[t]he First ... Department has denied an insurer's right to intervene in pending litigation between its insured and the alleged wrongdoer" to avoid creating an adversarial relationship between the insurer and the insured and perhaps complicating the litigation (*id.*, citing *Marshall v 426-428 West 46th Street Owners, Inc.*, 33 AD3d 444 [1st Dept 2006]; *Halloran v Don's 47 West 44th Street Restaurant Corp.*, 255 AD2d 206 [1st Dept 1998] [*other citation omitted*]).

The consent to change attorney form signed by plaintiffs in April 2021 does not confer standing upon St. Paul to seek recovery in subrogation as part of this wrongful death action. The assertions in the attorney affirmation in support of this motion that plaintiffs do not wish to proceed with the wrongful death action, that they have requested that they be removed from the caption, that only the subrogation matter remains, and that the only remaining party of interest in this litigation is St Paul, are unavailing. This Court declines to exercise its discretion to grant leave to non-party St. Paul to file and serve an amended summons and complaint substituting St. Paul as a party plaintiff in this action. The motion is denied without prejudice to St. Paul filing a separate subrogation action against the defendants. Accordingly, it is

ORDERED that St. Paul's motion for leave to file and serve an amended summons and complaint to substitute St. Paul as a direct party plaintiff as subrogee to plaintiffs in this action is denied without prejudice to filing a separate subrogation action against defendants.

This constitutes the Decision and Order of the Court.

7/29/2024
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE